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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ALAN ROGER GODDU,

Defendant and Appellant.

D051963

(Super. Ct. No. SCN228460)

APPEAL from a judgment of the Superior Court of San Diego County, Robert P. Dahlquist, Judge. Affirmed.

I.

INTRODUCTION

Appellant Alan Roger Goddu appeals from a judgment of conviction. A jury convicted Goddu of one count of assault with a deadly weapon (Pen. Code,<sup>1</sup> § 245, subd. (a)(1)) arising from an incident in which Goddu pointed a flare gun at an off-duty law enforcement officer after Goddu entered the officer's lane while making a wide right turn

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise indicated.

and the officer swerved and accelerated to avoid colliding with Goddu's vehicle. On appeal, Goddu challenges the sufficiency of the evidence to support his conviction. Specifically, Goddu argues that the evidence was insufficient to prove that the flare gun constituted a "deadly weapon" under the statute. According to Goddu, the evidence did not establish that the flare gun Goddu possessed "was capable of producing and likely to produce, death or great bodily injury." (Italics omitted.)

We conclude that there is sufficient evidence to support the jury's finding that the flare gun Goddu pointed at the victim was a "deadly weapon" under the circumstances presented here. We therefore affirm the judgment.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. *Factual background*

##### 1. *The prosecution*

At approximately 5:40 a.m., San Diego Sheriff's Deputy Edwin Brock was driving home after completing his shift at the Sheriff's station in Vista. Brock was stopped at an intersection, heading northbound on Melrose Drive, as he waited for the light to turn green. There was one car next to his. Goddu was in a third car, facing west, on a street perpendicular to the street on which Brock was driving.

When the traffic light turned green for northbound traffic, Brock proceeded through the intersection. As Brock was crossing through the intersection, Goddu made a wide right turn onto Melrose. Brock had to swerve left toward the median and accelerate in order to avoid hitting Goddu's vehicle.

Goddu pulled up next to Brock's vehicle and yelled, "Slow down, bitch." All of the windows of Brock's vehicle were lowered approximately two inches. Brock did not know whether Goddu's windows were open or not, but Brock could clearly hear Goddu yell at him. Brock responded by saying, "Whatever," and then accelerated away from Goddu.

Goddu pulled up next to Brock again, and pointed a large black gun at Brock. Goddu said something like, "I got something for you." Goddu was approximately eight to 10 feet away from Brock at the time. Brock accelerated to get away from Goddu, but Goddu accelerated to keep up with Brock. Brock then applied his brakes and let Goddu drive past him. Brock got behind Goddu's vehicle and noted Goddu's license plate number.

Brock then made a U-turn and pulled over to the side of the road. Brock reported the incident to his station. While he was parked at the side of the road, Brock watched Goddu pull into an apartment complex on Ascot Drive.

San Diego Sheriff's Deputy Michael Gildersleeve arrived a few minutes later and located Goddu's vehicle in the parking lot of the apartment complex on Ascot Drive. The driver's side window was approximately one-third the way down. Gildersleeve saw a flare gun on the passenger seat. The gun was loaded and cocked, ready for firing. There was a second flare cartridge in a pocket on the inside of the door on the driver's side.

At approximately 6:15 a.m., Gildersleeve found Goddu sitting against a brick wall, drinking a beer. He had bloodshot eyes and smelled of alcohol.

Goddu was taken to the police station where an officer administered a field sobriety test. Based on Goddu's performance, the officer concluded that Goddu was under the influence of alcohol. A blood test administered at 7:40 a.m. showed that Goddu's blood alcohol level was 0.17.

Erin Gould, a criminalist for the San Diego County Sheriff's crime lab, examined Goddu's flare gun and the two flare cartridges. Gould testified that the flare gun was operable and described the cartridges as containing a burning component called a "star." A fired star travels at between 483 and 557 feet per second. The star burns for approximately six seconds at 2,000 to 3,000 degrees.

## *2. The defense*

The defense called firearms expert Marc Halcon. Halcon testified that the type of flare gun at issue is a distress signaling device designed for use by recreational boaters. He determined that the gun would fire a flare at a muzzle velocity of 300 to 330 feet per second.<sup>2</sup> The flare had a delayed ignition device, which caused it to ignite after traveling approximately 100 feet from the gun's muzzle.

In Halcon's opinion, it was unlikely that a flare of this type would penetrate the side window of a car eight to 10 feet away. Halcon thought it was even less likely that a flare of this type would penetrate a car's side window if the person firing the flare and the

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<sup>2</sup> Halcon did not test Goddu's gun. He based his opinion on research done at a forensic lab for the Washington State Police, as well as on his conversations with a technical support person for the gun's manufacturer. The technical support person told Halcon that the velocity of the flare is between 300 and 350 feet per second.

target were driving parallel to one another at 45 miles per hour.<sup>3</sup> According to Halcon, a 45-mile-per-hour wind would push the flare backward, making it less likely that the flare would hit the target car's window. Halcon also thought it would be "highly unlikely" that the flare would have entered the target vehicle through a two-inch opening in the side window.

B. *Procedural background*

On July 2, 2007, an amended information was filed charging Goddu with assault with a deadly weapon (§ 245, subd. (a)(1) (count 1)); driving under the influence (Veh. Code, § 23152, subd. (a) (count 2)); and driving with a measurable amount of alcohol (Veh. Code, § 23152, subd. (b) (count 3)). The information also alleged that Goddu had suffered five prior convictions.

A jury trial commenced on July 2, 2007. On July 9, the jury found Goddu guilty of assault with a deadly weapon, as charged in count 1, but could not reach a verdict with respect to counts 2 and 3. The trial court declared a mistrial as to counts 2 and 3 and dismissed those charges.

The trial court sentenced Goddu on October 11, 2007. The trial court imposed the lower term of two years, and suspended execution of the sentence. The court placed Goddu on five years' formal probation.

Goddu filed a timely notice of appeal on October 12, 2007.

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<sup>3</sup> Gould had testified that it would not affect her conclusions if the gun and the target were traveling parallel at 45 miles per hour.

### III.

#### DISCUSSION

Goddu contends that there is insufficient evidence to support his conviction because he did not use the flare gun under circumstances in which the flare gun was capable of, much less likely to, produce great bodily injury.

" ' "In reviewing a criminal conviction challenged as lacking evidentiary support, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]' [Citation.]" [Citations] "An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise. [Citation.]" [Citation]' [Citation.]" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1014-1015.)

Goddu was convicted of assault with a deadly weapon under section 245, subdivision (a)(1). That section provides:

"Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment."

A deadly weapon under section 245, subdivision (a)(1) is "any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to

produce, death or great bodily injury." (*People v. Russell* (2005) 129 Cal.App.4th 776, 782.)

"Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citations.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.)

""When it appears, however, that an instrumentality . . . is capable of being used in a 'dangerous or deadly' manner, and it may be fairly inferred from the evidence that its possessor intended on a particular occasion to use it as a weapon should the circumstances require, . . . its character as a 'dangerous or deadly weapon' may be thus established, at least for the purposes of that occasion." [Citation.]" [Citations.]" (*People v. Page* (2004) 123 Cal.App.4th 1466, 1471 [holding that a pencil was capable of being used as a deadly weapon].)

According to Goddu, the flare gun at issue in this case was designed to be used as a signaling device, not as a weapon. Therefore, the jury had to consider the nature of the flare gun, the manner in which it was used, and other facts to determine whether Goddu used the flare gun in a manner likely to produce death or great bodily injury. According to Goddu, there was insufficient evidence that the nature of the flare gun and the manner in which he used it established that the flare gun was likely to produce death or great bodily injury under the circumstances.

Goddu focuses on his expert's testimony to suggest that the evidence is insufficient to support the jury's finding that he used the flare gun in a manner likely to produce death or great bodily injury. However, Goddu fails to acknowledge the evidence that the prosecution presented that supports such a finding. Specifically, Gould testified that the flare would travel at a high rate of velocity and burn for six seconds at temperatures between 2,000 and 3,000 degrees. She also testified that she would expect that the flare would make contact with an object that was approximately eight to 10 feet away. The jury could have reasonably inferred that Brock would have suffered great bodily injury if he had been struck with a flare projectile traveling at approximately 500 feet per second. The jury could also have reasonably inferred that Brock would have suffered great bodily injury if struck by an object that burns at 2,000 to 3,000 degrees. Further, the jury could have reasonably inferred that the use of the flare gun in this situation could have caused Brock to be in an accident such that Brock would have suffered great bodily injury. In other words, it would not be unreasonable for a jury to conclude, based on the evidence presented by the prosecution, that the manner in which Goddu used the flare gun constitutes using it in a manner likely to produce great bodily injury.

Goddu relies on the testimony given by his expert to the effect that it would have been "highly unlikely" for a flare fired from Goddu's gun to have penetrated the side window of Brock's car. In addition, Goddu complains that it would have been "highly unlikely" that the flare would have entered Brock's vehicle through the two-inch opening in Brock's passenger window. The jury was free to reject this testimony, or to conclude, as mentioned above, that even if the flare might not have entered Brock's vehicle, it could



have caused an accident. Goddu also points out that his expert testified that the flare would not ignite until it was approximately 100 feet away from the muzzle of the gun, and contends that the flare thus would not have ignited by the time it reached Brock, who was only eight to 10 feet away. Even if this is accurate, the jury could reasonably have concluded that being hit by a projectile traveling at a rate of 500 feet per second, even if the projectile was not ignited, would cause great bodily injury.

We conclude that the evidence presented by the prosecution was sufficient to support a jury determination that the flare gun, when pointed by Goddu directly at Brock from a distance of eight to 10 feet, was a deadly weapon.

#### IV.

#### DISPOSITION

The judgment of the trial court is affirmed.

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AARON, J.

WE CONCUR:

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NARES, Acting P. J.

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IRION, J.